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## DON'T ASK, DON'T TELL: THE SAME OLD POLICY IN A NEW UNIFORM?

On February 28, 1994, the "Policy Concerning Homosexuality in the Armed Forces" Act became law.<sup>1</sup> A memorandum issued by the Secretary of Defense explained the new act by stating that no one applying to the military "will be asked about his or her sexual orientation."<sup>2</sup> This new policy, referred to as "Don't ask, Don't tell,"<sup>3</sup> is a result of President Clinton's campaign promise to lift the ban on homosexuals serving in the military.<sup>4</sup> The President's promise, however, fell apart in the face of tough opposition from both Congress and the Pentagon's Joint Chiefs of Staff.<sup>5</sup> Accordingly, the new policy differs very little from the policy it replaces.<sup>6</sup>

Part I of this Comment examines the history of the ban on homosexuals in the military and compares the new "Don't ask, Don't tell" policy with the policy that it has replaced. Because the ban does not exist in a vacuum, Part II discusses the origins of sexual orientation and its role in human sexual relations. Part III discusses criticisms of and challenges to the ban on homosexuals in the military. Part IV examines the constitutionality of excluding homosexuals from the service based on evidence indicating a biological basis for sexual orientation. This Comment concludes with a forecast of the "Don't ask, Don't tell" policy should the issue reach the Supreme Court.

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1. Pub. L. No. 103-160, 107 Stat. 1670 (codified at 10 U.S.C. § 654 (Supp. V 1993)).

2. Memorandum from Secretary of Defense Les Aspin on Implementation of DoD Policy on Homosexual Conduct in the Armed Forces (Dec. 21, 1993) [hereinafter Les Aspin Memorandum] (on file with *The Journal of Contemporary Health Law and Policy*). "The directive makes clear that no one will be asked about his or her sexual orientation as part of the accession process, although homosexual conduct may be a basis for rejection for enlistment, appointment and induction." *Id.*

3. See Kathryn Wexler, *ROTC Still Draws Protests, but Issue Now Is Bias Against Gay Students*, WASH. POST, Nov. 17, 1994, at A3.

4. Chandler Burr, *Friendly Fire*, CAL. LAW., June 1994, at 54.

5. *Id.*

6. See *id.* at 98; see also Rowan Scarborough, *Dornan: No More Women in Combat; Fiery Conservative Revels in GOP Win*, WASH. TIMES, Feb. 4, 1995, at A5 ("'Don't ask, don't tell is the best. It's 98 percent' of the original ban, Mr. Dornan said . . .").

## I. THE BAN ON HOMOSEXUALS IN THE MILITARY

### A. History of the Ban

As early as 1778, the United States military was discharging servicemen on the basis of homosexuality.<sup>7</sup> After a court-martial presided over by Lieutenant Colonel Aaron Burr, Lieutenant Gotthold Frederick Enslin was discharged from the Army on March 11, 1778, by an order of General George Washington.<sup>8</sup> The first regulations specifically banning homosexuals from service were enacted in 1942.<sup>9</sup> These regulations declared that "persons habitually or occasionally engaged in homosexual or other perverse sexual practices" were "unsuitable for military service."<sup>10</sup> Since that time, application of the regulations has vacillated between strict and liberal, depending upon the manpower needs of the military at a particular time.<sup>11</sup>

While some believe that "the great majority of homosexuals who serve in the military are never detected at all,"<sup>12</sup> approximately 17,000 servicemen (an annual average of about 1,500) were discharged from the military between 1980 and 1990 on the basis of "homosexuality."<sup>13</sup> This constitutes nearly 1.6% of the average number of involuntary discharges for those years.<sup>14</sup> The cost for these discharges ranged from approxi-

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7. RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY 11-12 (1993).

8. *Id.* "Some observers have suggested that Enslin's sentence is evidence that Washington held a lenient view of homosexuality, since such transgressions could have been punishable by imprisonment or even death in the conventions of the day." *Id.* at 12.

9. *Id.* at 13.

10. *Id.* at 16-17; see also Major Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 72-79 (1991) (discussing the history of homosexuals in the Armed Forces).

11. SHILTS, *supra* note 7, at 17. The policy in 1945, for example, was either to court-martial homosexuals or to hospitalize homosexuals deemed to be "reclaimable." Davis, *supra* note 10, at 75. The policy changed in 1946 to allow honorable discharges for enlisted personnel who were being discharged for homosexuality but had not committed any sexual offense while in service. Officers were permitted to resign under honorable conditions. *Id.* This changed again in 1948 as the provision for honorable discharge was removed and "[h]omosexuals were to be tried by court-martial or separated as unfit with an undesirable discharge." *Id.* In 1955, certain homosexuals could, again, get an honorable discharge. *Id.* at 76. In 1982, the Department of Defense issued a directive ordering total exclusion of all personnel fitting the definition of a homosexual. *Id.* at 79. That was the last major change in the policy regarding homosexuals in the service until the implementation of the "Don't ask, Don't tell" policy. *Id.*

12. Davis, *supra* note 10, at 69.

13. GENERAL ACCOUNTING OFFICE, DoD'S POLICY ON HOMOSEXUALITY 4 (1992) [hereinafter GAO REPORT].

14. *Id.* at 16.

mately \$28,226 per discharged enlisted personnel to \$120,772 per discharged officer for the fiscal year 1990.<sup>15</sup>

Just as implementation of the regulations has shifted over the years,<sup>16</sup> so to has the rationale for the ban on homosexuals.<sup>17</sup> "National security" was the rationale advanced during the anti-Communist McCarthy era.<sup>18</sup> More recently, that rationale was replaced by the need to preserve "good order, discipline and morale."<sup>19</sup>

The use of national security as a rationale for banning homosexuals in the military had to be abandoned when two reports, one by the Navy<sup>20</sup> and the other prepared by the Department of Defense's ("DoD") Defense Personnel Security Research and Education Center (PERSEREC),<sup>21</sup> concluded that homosexuals pose no more of a security risk to the military than do heterosexuals.<sup>22</sup> The PERSEREC report found no evidence that sexual orientation affects an individual's suitability for military service.<sup>23</sup> Although the DoD has backed away from security concerns as a rationale for the policy of excluding homosexuals from service, it continues to support the policy with the rationale that exclusion is "needed to maintain good order and discipline."<sup>24</sup>

#### B. "Don't Ask, Don't Tell" Compared to Former Policy

The "Don't ask, Don't tell" policy differs little from the old policy.<sup>25</sup>

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15. *Id.* at 4. These costs reflect the costs associated with initial training and replacement of troops discharged and do not reflect the total costs which would have to include costs for out-processing and court costs. *Id.*

16. SHILTS, *supra* note 7, at 17.

17. *Id.*

18. *Id.*

19. *Id.*

20. THE CRITTENDEN REPORT: REPORT OF THE BOARD APPOINTED TO PREPARE AND SUBMIT RECOMMENDATIONS TO THE SECRETARY OF THE NAVY FOR THE REVISION OF POLICIES, PROCEDURES AND DIRECTIVES DEALING WITH HOMOSEXUALS, Dec. 12, 1956 - Mar. 15, 1957 [hereinafter CRITTENDEN REPORT].

21. THEODORE R. SARBIN, PH.D., HOMOSEXUALITY AND PERSONNEL SECURITY, Defense Personnel Security Research and Education Center (PERSEREC), PERS-TR-91-008 (1991) [hereinafter PERSEREC].

22. GAO REPORT, *supra* note 13, at 30.

23. *Id.* at 31.

24. *Id.* at 5; see also Memorandum from Assistant Secretary of Defense Edwin Dorn on Briefing Armed Forces Applicants app. (not dated) (on file with *The Journal of Contemporary Health Law and Policy*) (stating that it is a "requirement for military units and their members to possess high standards of morale, good order and discipline, and cohesion"). "[H]omosexual conduct is grounds for discharge from the Armed Forces." *Id.*

25. See Scarborough, *supra* note 6, at A5; see also Art Pine, *Few Benefit From New Military Policy on Gays*, L.A. TIMES, Feb. 6, 1995, at A1, A14 (stating that "the new policy

"The services are continuing to throw out gay men and lesbians at about the same rate as they did before the new policy evolved."<sup>26</sup> Under the former policy, there were three grounds for discharging a servicemember for homosexuality: a statement, an act, or a marriage or attempt to marry someone of the same sex.<sup>27</sup> Under the new policy, however, a servicemember may not be questioned about his or her sexual orientation or homosexual conduct unless there is "independent evidence" of homosexual conduct or a statement by the servicemember that he or she is a homosexual or bisexual.<sup>28</sup> While this policy does not bar military service based on sexual orientation, it does bar service based on homosexual conduct.<sup>29</sup> Homosexual conduct is defined in the new policy as "a homosexual act, a statement . . . that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage."<sup>30</sup>

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appears to be producing few real changes or benefits for any of those involved—particularly for homosexuals").

26. Pine, *supra* note 25, at A14. Furthermore, Pine has stated:

The number of service members being discharged for homosexuality has been declining in recent years, but with the size of the armed forces shrinking, the proportion for the overall military remains about the same, Pentagon figures show. Critics complain that the totals do not include cases in which commanders deal with cases by forcing gay men and lesbians out of the service on unrelated charges or by denying them the opportunity to re-enlist.

*Id.*

27. KATHERINE BOURDONNAY ET AL., *FIGHTING BACK: LESBIAN AND GAY DRAFT, MILITARY AND VETERAN ISSUES* 19 (Joseph Schuman & Kathleen Gilberd eds., 1985) [hereinafter *FIGHTING BACK*].

28. Department of Defense Directive 1304.26, Enclosure 2, Qualification Standards for Enlistment, Appointment, and Induction § B.8.a. (1993) [hereinafter DoD Dir. 1304.26, Enclosure 2].

29. *See id.*; 10 U.S.C. § 654(b)(1) (Supp. V 1993); Les Aspin Memorandum, *supra* note 2.

30. DoD Dir. 1304.26, Enclosure 2, *supra* note 28, at § B.8.b.; 10 U.S.C. § 654(b) (Supp. V 1993). Another difference is that:

Unlike the old policy, the new directive imposes a rebuttable presumption on servicemembers who say they are gay. The presumption is that servicemembers who make such statements engage in, have a propensity to engage in, or intend to engage in homosexual acts. The regulations place the burden of disproving this presumption on servicemembers.

Memorandum from Servicemembers Legal Defense Network to Edwin Dorn, Assistant Secretary of Defense, and Jamie Gorelick, General Counsel of the Department of Defense, regarding Analysis: New Pentagon Policy on Gays in the Military, at 3 (Jan. 27, 1994) [hereinafter SLDN Memorandum] (on file with *The Journal of Contemporary Health Law and Policy*). The Servicemembers Legal Defense Network ("SLDN"), founded in 1993, is a non-profit organization that works to find legal representation for members of the armed services who face investigation and discharge from the military because of their sexual orientation. En Banc Brief for *Amici Curiae* National Lesbian and Gay Law Association

The new policy merely combines the old grounds for dismissal into a single definition of homosexual conduct. Furthermore, while a servicemember may not be questioned about his or her sexual orientation unless "independent evidence" exists of homosexual conduct (under the new, expansive definition of conduct), "[t]here is no definition of 'independent evidence' or any requirement that this evidence be true or credible."<sup>31</sup>

The "Don't ask, Don't tell" policy actually seems to relax the grounds for dismissing homosexuals. For example, the old policy defined a "homosexual act" as "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires."<sup>32</sup> The new policy, however, retains that definition and adds a second part: "any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (i) [i.e., the original definition of homosexual act]."<sup>33</sup> This "reasonable person" standard expands the former definition far beyond an act committed for the purpose of satisfying sexual desires. Counsel working with servicemembers affected by the new policy have found that "[w]hat matters is someone else's perception of an activity, not whether one is actually gay or engaging in an activity for the purpose of sexual gratification."<sup>34</sup> Under this more expansive definition, "any physical touch, even if platonic, as well as a wide variety of statements and behaviors could be construed as homosexual in nature."<sup>35</sup> Finally, the "Don't ask, Don't tell" policy is a misnomer because it does not really forbid the military to ask a servicemember about his or her sexual orientation. Rather, it allows questioning if "independent evidence," which remains undefined under the new policy, exists.

## II. ORIGINS OF SEXUAL ORIENTATION

While the military has been discharging servicemembers because of their sexual orientation, the scientific community has been moving forward with studies suggesting a biological role in human sexuality.<sup>36</sup> In

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and Servicemember's Legal Defense Network at 1-2, *Steffan v. Aspin*, 1994 U.S. App. LEXIS 9977 (D.C. Cir. 1994) (No. 91-5409) [hereinafter Brief for *Amici Curiae*].

31. SLDN Memorandum, *supra* note 30, at 2.

32. *FIGHTING BACK*, *supra* note 27, at 19.

33. DoD Dir. 1304.26, Enclosure 2, *supra* note 28, at § B.8.b(1)(d)(ii).

34. SLDN Memorandum, *supra* note 30, at 4.

35. *Id.*

36. See generally William A. Henry III, *Born Gay?*, *TIME*, July 26, 1993, at 36; Sharon

1948, biologist Alfred C. Kinsey identified, through a nine-year case study of human sexuality, that thirty-seven percent of the male population has had some homosexual experience after entering adolescence.<sup>37</sup> Since Kinsey's report, other researchers have published studies on human sexuality, including Masters and Johnson<sup>38</sup> and a recently completed study by Edward Laumann.<sup>39</sup>

According to the most recent study, 2.7% of men and 1.3% of women reported having had sex with someone of the same gender in the past year.<sup>40</sup> Other random-population studies in the United States, Germany, and Canada have reported that as few as 0.3% and as many as 6.2% of men identify themselves as homosexual.<sup>41</sup> A study by Dean Hamer, chief of the Section on Gene Structure and Regulation at the National Cancer Institute, found a two percent "population incidence of male homosexuality."<sup>42</sup>

Biological causes of homosexuality have also been addressed by researchers. Studies have identified biological differences between homosexual and heterosexual men.<sup>43</sup> One study, by neuroanatomist Simon LeVay, found a significant difference between the size of the hypothalamus of homosexual and heterosexual men.<sup>44</sup> Other scientists have found differences between the size of other brain structures.<sup>45</sup> "[These] finding[s] indicate[] that . . . sexual orientation has a biological substrate."<sup>46</sup>

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Begley & Mary Hager, *Does DNA Make Some Men Gay?*, NEWSWEEK, July 26, 1993, at 59 (providing reports of this research in the popular press).

37. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 623 (1948).

38. WILLIAM MASTERS ET AL., *MASTERS AND JOHNSON ON SEX AND HUMAN LOVING* (1986).

39. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* (1994); see also Philip Elmer-Dewitt, *Now for the Truth About Americans and Sex*, TIME, Oct. 17, 1994, at 63 (discussing results of this study).

40. Elmer-Dewitt, *supra* note 39, at 64. These figures should be compared to 6.2% of men and 4.4% of women who report that they are sexually attracted to people of the same gender. *Id.* at 68. The discrepancy between those who are attracted and those who act on that attraction may be attributable to a number of factors. For example, as the study reports, AIDS has changed the way some people conduct their sex lives. *Id.* at 68-70.

41. DEAN HAMER & PETER COPELAND, *THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR* 99 (1994).

42. *Id.* at 101.

43. See *id.* at 159-63 (providing a discussion of these studies).

44. Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034, 1034 (1991).

45. See HAMER & COPELAND, *supra* note 41, at 163 (citing a Netherlands study which identified another structure of the brain, the suprachiasmatic nucleus, as differing in size between homosexual and heterosexual men).

46. LeVay, *supra* note 44, at 1034.

The most recent search for a biological underpinning for sexual orientation found "evidence that one form of male homosexuality is preferentially transmitted through the maternal side and is genetically linked to the chromosomal region Xq28."<sup>47</sup> Using male subjects who identified themselves as homosexual, this study found an increased rate of same-sex orientation among the subject's maternal uncles and male cousins, but not among their fathers or paternal relatives.<sup>48</sup> This suggests the possibility of genetic transmission in a segment of the homosexual population.<sup>49</sup> The study also performed a deoxyribonucleic acid ("DNA") analysis on a population of families that had two homosexual brothers whose homosexuality was not transmitted through their fathers or to females in the family. In thirty-three out of forty of these sibling pairs, both brothers had inherited genetic information in the chromosomal region Xq28.<sup>50</sup> The study reported a confidence level of more than ninety-nine percent and thus concluded, "it appears that Xq28 contains a gene that contributes to homosexual orientation in males."<sup>51</sup>

The results of this study have begun to influence courts in cases where homosexuals are discriminated against because of their sexuality. The District Court of the City and County of Denver, State of Colorado, in *Evans v. Romer*,<sup>52</sup> subpoenaed the author of the study, Dean Hamer, to testify in the legal challenge to Amendment Two, an amendment "prohibiting the State from giving homosexuals protected status or claims of discrimination before the law."<sup>53</sup> The presiding judge, in finding Amendment Two unconstitutional, wrote, "[t]he preponderance of credible evidence suggests that there is a biologic or genetic 'component' of sexual orientation."<sup>54</sup>

Dr. Hamer suggests that lawyers representing homosexuals will rely on scientific findings of a biological role in sexual orientation.<sup>55</sup> He reports

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47. Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321, 325 (1993).

48. *Id.* at 321, 326.

49. *Id.* at 321.

50. *Id.* at 325.

51. *Id.*

52. *Evans v. Romer*, 63 Empl. Prac. Dec. (CCH) ¶ 42,719, at 77,939 (Colo. D.C. Dec. 14, 1993).

53. HAMER & COPELAND, *supra* note 41, at 210.

54. *Evans*, 63 Empl. Prac. Dec. (CCH) ¶ 42,719, at 77,939; *see also* Equality Foundation of Cincinnati v. Cincinnati, 860 F. Supp. 417, 420 (S.D. Ohio 1994) (finding, based on other expert testimony, that "[s]exual orientation is set in at a very early age . . . and is not only involuntary, but is unamenable to change").

55. HAMER & COPELAND, *supra* note 41, at 212.



that lawyers have said that "they will continue to press the immutability argument in cases of . . . military policy . . . because it has become an integral part of civil-rights law."<sup>56</sup>

### III. CRITICISMS AND CHALLENGES TO THE MILITARY BAN ON HOMOSEXUALS

#### A. Criticisms

The DoD's policy excluding homosexuals from service, both before and after "Don't ask, Don't tell," has been criticized and challenged.<sup>57</sup> Specifically, the American Psychiatric Association, the American Psychological Association, and the American Bar Association have expressed disagreement with the policy.<sup>58</sup> Studies commissioned by the DoD, itself, have also criticized the military's policy.<sup>59</sup> For example, *The Crittenden Report*,<sup>60</sup> submitted to the Secretary of the Navy in 1957,<sup>61</sup> found that homosexuals were no more of a security risk than other groups and that "there have been many documented instances of individuals who have reported themselves as having homosexual tendencies and who nonetheless have continued on duty and served honorably and well."<sup>62</sup> The Defense Personnel Security Research and Education Center issued another report reiterating *The Crittenden Report's* finding that homosexuals posed no security risk, per se.<sup>63</sup> It also found "no evidence that . . . sexual

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56. *Id.*

57. See Brief for *Amici Curiae*, *supra* note 30, at 11 n.2 (listing 16 citations to statements made by military figures "urging an end to the ban and dismissing the notion that the presence of gay men and lesbians in the military impedes the functioning of the services in any way"). See generally HOMOSEXUALITY AND THE MILITARY: A SOURCEBOOK OF OFFICIAL, UNCENSORED U.S. GOVERNMENT DOCUMENTS (not dated) (containing reports by the DoD, polling data, and other information from both sides of the debate on homosexuals in the military).

58. GAO REPORT, *supra* note 13, at 36. "The [American Psychiatric] Association's 1973 position on homosexuality and homosexuals in the military was that 'homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'" *Id.* The American Psychological Association resolved in 1975 to support the position of the American Psychiatric Association "by also opposing the exclusion and dismissal of persons from the armed services on the basis of sexual orientation." *Id.*; SHILTS, *supra* note 7, at 690.

59. GAO REPORT, *supra* note 13, at 29-35.

60. THE CRITTENDEN REPORT, *supra* note 20. The report gets its name from the Chairman of the Board appointed to prepare and submit recommendations to the Secretary of the Navy for the revision of policies, procedures, and directives dealing with homosexuals. GAO REPORT, *supra* note 13, at 29.

61. GAO REPORT, *supra* note 13, at 29.

62. *Id.*

63. *Id.* at 31.

orientation affects an individual's suitability for military service,"<sup>64</sup> and recommended further research on the subject.<sup>65</sup>

Other critics of the policy have compared it to the military's exclusion of African-Americans prior to President Truman's integration of the military in 1948.<sup>66</sup> Some judges have commented on this comparison in their decisions.<sup>67</sup> For example, Judge Hatter, in his opinion in *Meinhold v. United States*,<sup>68</sup> commented: "The Department of Defense's justifications for its policy banning gays and lesbians from military service are based on cultural myths and false stereotypes. These justifications are baseless and very similar to the reasons offered to keep the military racially segregated in the 1940's."<sup>69</sup>

A further criticism of the "Don't ask, Don't tell" policy is that it amounts to sexism.<sup>70</sup> The "institutionalized sexual harassment of military women through 'lesbian-baiting'—the practice of pressuring and harassing women through calling, or threatening to call them, lesbians" is seen as an informal barrier which "prevent[s] full recognition of women's contributions in job fields . . . open to them."<sup>71</sup> In addition to these criticisms, both inside and outside the military, the policy of excluding homosexuals from military service has been challenged in the courts.<sup>72</sup>

### B. Court Challenges

Until recently, the military's policy against homosexuals had routinely

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64. *Id.*

65. *Id.* at 33.

66. See generally David Bianco, *Echoes of Prejudice: A Comparison of the Arguments Opposing Military Racial Integration with the Arguments Opposing Allowing Gays and Lesbians to Serve Openly* (Dec. 15, 1992) (unpublished manuscript, available from The Human Rights Campaign Fund, 1012 14th St., N.W., Ste. 607, Washington, D.C. 20005).

67. See, e.g., *Meinhold v. United States*, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993), *stay granted in part, denied in part*, 114 S. Ct. 394 (1993), and *aff'd in part, rev'd in part*, 34 F.3d 1469 (9th Cir. 1994) (providing that the "justifications for banning gays and lesbians from military service are based on cultural myths and false stereotypes"); *Selland v. Aspin*, 832 F. Supp. 12, 14 n.1 (D.D.C. 1993) (comparing burden borne by commanders for police harassment of homosexuals with that borne by commanders after the inclusion of blacks and women in the armed forces).

68. 808 F. Supp. 1453 (C.D. Cal. 1992); see also discussion *infra* part III.B.1.

69. *Meinhold*, 808 F. Supp. at 1458.

70. See Michelle M. Benecke & Kirstin S. Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215, 232-33 (1990).

71. *Id.* at 216.

72. See, e.g., GAO REPORT, *supra* note 13, at 46-53 (highlighting seven cases as "[e]xamples of [e]xpulsions for [w]hich [p]erformance [w]as [n]ot an [i]ssue").

been upheld by the courts through "judicial deference" to the military's judgment.<sup>73</sup> In 1991, however, the United States Court of Appeals for the Ninth Circuit, in *Pruitt v. Cheney*,<sup>74</sup> stated that it would not defer to the military and uphold "its regulation without a record to support its rational basis."<sup>75</sup> This meant that the Department of Justice, arguing for the military, would have to provide a factual basis to justify the policy.<sup>76</sup>

### 1. *Meinhold v. United States*<sup>77</sup>

The United States District Court for the Central District of California followed the *Pruitt* decision in *Meinhold v. United States*.<sup>78</sup> The *Meinhold* court, citing *Pruitt*, stated that "the Court cannot merely defer to the 'military judgment' as the rationale for the policy—the Court must consider the factual basis underlying the 'military judgment.'"<sup>79</sup>

In 1980, seventeen-year-old Volker Keith Meinhold enlisted in the Navy.<sup>80</sup> In his twelve years of service, he was, "by [the] Navy's own admission, one of its very best airborne sonar analysts and instructors."<sup>81</sup> Meinhold was rated in the top ten percent of all Navy instructors when the Navy initiated discharge proceedings against him on the basis of his sexual orientation in 1992.<sup>82</sup>

The Navy was aware of Meinhold's sexual orientation because he had "publicly acknowledged his gay orientation to various Navy representatives, including senior officers."<sup>83</sup> Indeed, he was "sufficiently open about his sexual orientation that his status became common knowledge within his unit."<sup>84</sup> Nonetheless, the Navy initiated discharge proceedings against Meinhold immediately after he acknowledged that he was a ho-

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73. Burr, *supra* note 4, at 54, 55.

74. 963 F.2d 1160 (9th Cir.), *cert. denied*, 113 S. Ct. 655 (1992).

75. *Id.* at 1167; *see also* Melinda S. Cooper, *Equal Protection and Sexual Orientation in Military and Security Contexts: An Analysis of Recent Federal Decisions*, 3 L. & SEXUALITY 201, 226 (1993).

76. Burr, *supra* note 4, at 55. *But see* GAO REPORT, *supra* note 13, at 28 ("According to DoD, the courts have not required scientific evidence to support DoD's policy.").

77. 808 F. Supp. 1453 (C.D. Cal. 1992), *summary judgment granted*, 808 F. Supp. 1455 (C.D. Cal.), *stay granted in part, denied in part*, 114 S. Ct. 374 (1993), and *aff'd in part, rev'd in part*, 34 F.3d 1469 (9th Cir. 1994).

78. *See id.* at 1457.

79. *Id.* at 1457.

80. *Id.* at 1454.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

mosexual on a national news program.<sup>85</sup> He was discharged from the Navy within three months.<sup>86</sup>

Meinhold sought a preliminary injunction against the Navy requesting immediate reinstatement.<sup>87</sup> The district court ordered Meinhold reinstated.<sup>88</sup> In its amended opinion, the court enjoined the "Department of Defense . . . from discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States."<sup>89</sup> Upon the Solicitor General's application for a stay, the Supreme Court stayed the district court's order granting "relief to persons other than Volker Keith Meinhold . . . pending disposition of the appeal by the United States Court of Appeals for the Ninth Circuit."<sup>90</sup> This decision allowed Meinhold to continue on active duty.

Both the appellate court in *Pruitt* and the district court in *Meinhold* based their decisions upon equal protection challenges to the policy.<sup>91</sup> In *Meinhold*, the Ninth Circuit upheld the district court's decision as to Meinhold.<sup>92</sup> However, the Ninth Circuit found that it did not need to address the equal protection argument and, instead, based its decision on a different interpretation of the policy.<sup>93</sup>

The appellate court reasoned that the DoD could exclude persons based upon homosexual conduct.<sup>94</sup> The court, however, found that "[c]onstruing the regulation to apply to the 'classification of being homosexual' [would] clearly implicate[] equal protection" violations as it did in *Pruitt*.<sup>95</sup> Therefore, the Ninth Circuit followed the "cardinal rule that courts must first determine whether a construction is possible by which

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1458.

90. *Meinhold*, 114 S. Ct. at 374.

91. *Meinhold*, 808 F. Supp. at 1457; *Pruitt*, 963 F.2d at 1167.

92. *Meinhold*, 34 F.3d at 1480.

93. *Id.* at 1476.

94. *Id.* at 1477.

95. *Id.*; see also Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 384 (1994) (discussing the "status versus conduct" distinction). "[T]he [Supreme Court] cases show that the status/conduct distinction actually has two components. The first component is the substance of the rule itself: Punishment and discrimination must be based on conduct, not status. The second component is evidentiary: Status itself cannot be used as the 'evidence' of conduct." *Id.* at 386.

the constitutional problem may be avoided."<sup>96</sup> Accordingly, the court construed the regulation to require discharge only when a statement of homosexuality shows a "concrete, fixed, or expressed desire to commit homosexual acts despite their being prohibited."<sup>97</sup> The court found that Meinhold's statement, "I am in fact gay," did not manifest that desire.<sup>98</sup> Surprisingly, the government did not appeal to the full panel of the Ninth Circuit, leaving intact the circuit court's order reinstating Meinhold.<sup>99</sup> This decision appears to indicate that the Clinton Administration is choosing not to defend the old policy—a policy that "they can say is not theirs."<sup>100</sup>

## 2. Cammermeyer v. Aspin<sup>101</sup>

The story of Margarethe Cammermeyer, a former colonel in the Washington State National Guard,<sup>102</sup> is well-known, having been told in a made-for-TV movie.<sup>103</sup> Cammermeyer entered the Army Student Nurse Corps in 1961 and served in the Army until 1986, with the exception of a four year period when she was forced to resign because of pregnancy.<sup>104</sup> In 1986, Cammermeyer transferred to the Washington State National Guard where she served until she was discharged on June 11, 1992.<sup>105</sup> Cammermeyer's service in the Army and the Washington State National Guard has been described as "remarkable."<sup>106</sup> In fact, she received a Bronze Star for distinguished service in Vietnam, among other "numerous awards and distinctions."<sup>107</sup>

Cammermeyer applied for admission to the Army War College to re-

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96. *Meinhold*, 34 F.3d at 1476 (citing *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 n.22 (1979)).

97. *Id.* at 1479.

98. *Id.*

99. Eric Schmitt, *Juggling Policy on Gay Troops: Clinton Administration Caught Up in Appeals of Old and New*, N.Y. TIMES, Oct. 18, 1994, at B8.

100. *Id.* (quoting Chai Feldblum, a Georgetown University law professor who was legal director of the Campaign for Military Service, a coalition of gay rights groups lobbying to lift the ban on homosexuals in the military).

101. 850 F. Supp. 910 (W.D. Wash. 1994).

102. *Id.* at 910.

103. See Sue Carswell, *An Officer and a Gentlewoman*, OUT, Feb. 1995, at 56, 56 ("Unfazed by public perception, Glenn Close takes the dramatic lead in the movie version of Colonel Margarethe Cammermeyer's life story.").

104. *Cammermeyer*, 850 F. Supp. at 912.

105. *Id.*

106. *Id.*

107. *Id.*

ceive training to become Chief Nurse of the National Guard Bureau.<sup>108</sup> During a security check required for admission to the Army War College, Cammermeyer was asked about her sexual orientation and she replied that she was a lesbian.<sup>109</sup> Despite her admission, "Cammermeyer was told by the Washington State National Guard that she could continue to serve as Chief Nurse, and that the Guard would not pursue her discharge 'unless forced to do so' by the Department of the Army."<sup>110</sup>

Six months later, the United States Army began proceedings to withdraw Cammermeyer's federal recognition.<sup>111</sup> These proceedings would make "her ineligible to serve in the Washington State National Guard or any other branch of the military."<sup>112</sup> Former Chief Nurse of the National Guard Bureau, Colonel Patsy Thompson, presided over Cammermeyer's Federal Recognition Board. She "openly regretted her 'sad duty' of reading the Board's adverse recommendation to 'one of the great Americans' . . . [and] . . . stated that Cammermeyer 'has consistently provided superb leadership and has many outstanding accomplishments to her credit.'"<sup>113</sup> On June 11, 1992, Cammermeyer received an honorable discharge based upon the Board's recommendation.<sup>114</sup> According to the court, she is "believed to be the highest ranking officer in any service of the U.S. Armed Forces to have been discharged because of homosexual status."<sup>115</sup>

Cammermeyer brought a declaratory judgment action against the government claiming that her discharge violated her right to equal protection under the Fifth Amendment of the United States Constitution.<sup>116</sup> The

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108. *Id.*

109. *Id.* at 912-13.

110. *Id.* at 913 (quoting Cammermeyer Decl. at 18).

111. *Id.*

112. *Id.*

113. *Id.* (quoting the Tr. of Hearing before Federal Recognition Board, Vol. 2, at 131-33).

114. *Id.*

115. *Id.* at 913 n.6.

116. *Id.* at 912. Cammermeyer also claimed her discharge "violated her right to privacy under the First, Fourth, Fifth and Ninth Amendments to the Constitution, her substantive due process rights under the Fifth Amendment and her right to freedom of speech under the First Amendment." *Id.* She also claimed that the Army regulation under which she was discharged was an "invalid exercise of executive power violative of the constitutional separation of powers, and that the regulation violates principles of federalism." *Id.* The court addressed at length Cammermeyer's equal protection claim. *Id.* at 914-26. It also addressed her substantive due process and First Amendment claims. *Id.* at 926-29. The court found merit in her equal protection and substantive due process claims. *Id.* at 926, 928. The court granted summary judgment to defendants on Cammermeyer's First Amendment claim, finding that "every court that has addressed this issue has refused to grant relief on First Amendment grounds." *Id.* at 929. The court "construe[d] [Cammermeyer]'s

court found that Cammermeyer "was discharged from the National Guard pursuant to a governmental policy that is based solely on prejudice."<sup>117</sup> Furthermore, the court stated that "[p]rejudice, whether founded on unsubstantiated fears, cultural myths, stereotypes or erroneous assumptions, cannot be the basis for a discriminatory classification."<sup>118</sup> The court granted Cammermeyer's motion for summary judgment on her equal protection and substantive due process claims<sup>119</sup> and entered an order "requiring defendants to reinstate her to her former position in the Washington State National Guard and to restore to her all rights, honors and privileges of that status."<sup>120</sup> The government has appealed.<sup>121</sup>

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failure to respond to defendants' motion for summary judgment on [the invalid exercise of executive power and principles of federalism] as a concession that these claims are without merit and . . . grant[ed] defendants' motion as to these claims." *Id.*

117. *Id.* at 929.

118. *Id.* (citing *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1995)).

119. *Id.*

120. *Id.* The order, in full, stated:

- a. For an order requiring defendants to reinstate her to her former position in the Washington State National Guard and to restore to her all rights, honors and privileges of that status;
- b. For an order requiring defendants to expunge all record of plaintiff's sexual orientation and her statements, if any, regarding same from any and all records in defendants' possession;
- c. For an order enjoining defendants from taking any adverse action against plaintiff by reason of her homosexual status or on account of statements of her homosexual orientation;
- d. For an order enjoining defendants from taking any action against plaintiff based on the purported authority of directives or regulations mandating separation from military service by reason of homosexual status or on account of statements of homosexual orientation;
- e. For a declaration that defendants' action in separating plaintiff from military service based solely on her declaration of homosexual orientation was unconstitutional;
- f. For a declaration that defendants' regulation mandating separation from service by reason of homosexual status or on account of statements of homosexual orientation is unconstitutional; and
- g. Costs of suit.

*Id.*

121. See Carswell, *supra* note 103, at 59. Oral arguments are scheduled for the fall of 1995. Memorandum from C. Dixon Osburn & Michelle Benecke titled "Update on Military Cases and Discharge Proceedings" at 11 (July 1995) [hereinafter Update] (on file with *The Journal of Contemporary Health Law and Policy*).

### 3. Steffan v. Cheney<sup>122</sup>

Joseph Steffan was consistently ranked near the top of his class at the Naval Academy (the "Academy").<sup>123</sup> He enrolled in the Academy in 1983 and successfully completed three years of training.<sup>124</sup> During the fall of his senior year, Steffan confided that he was a homosexual and had relations with two fellow midshipmen.<sup>125</sup> This conversation was reported to Academy officials and, as a result, the Naval Investigative Service began an investigation into Steffan's homosexuality.<sup>126</sup>

A meeting of the Academy Performance Board was convened on March 24, 1987.<sup>127</sup> At that meeting, Steffan was asked if he was "a homosexual," to which he replied, "yes."<sup>128</sup> The Performance Board recommended to the Commandant of the Academy that "Steffan be separated from the Naval Academy due to insufficient aptitude for commissioned service."<sup>129</sup> The Commandant accepted the recommendation and forwarded it to the Academic Board which met on April 1, 1987, and "voted to recommend Steffan's discharge from the Academy to the Secretary of the Navy."<sup>130</sup>

Following a meeting of the Academic Board, Steffan was offered a choice between submitting a "qualified resignation" or risk discharge.<sup>131</sup> Steffan chose to resign and the Secretary of the Navy accepted his resignation on May 28, 1987.<sup>132</sup> On December 9, 1988, Steffan wrote to the Secretary of the Navy, requesting the withdrawal of his resignation and

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122. 733 F. Supp. 115 (D.D.C.), *later proceeding*, 733 F. Supp. 121 (D.D.C. 1989), *rev'd*, 920 F.2d 74 (D.C. Cir. 1990), *summary judgment granted*, 780 F. Supp. 1 (D.D.C. 1991), *rev'd sub nom. Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *vacated, en banc, reh'g, en banc, granted*, 1994 U.S. App. LEXIS 9977 (D.C. Cir.), *and aff'd, sub nom. Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994).

123. *Steffan*, 41 F.3d at 683.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* Navy regulations provide that homosexuality "severely limit[s] a midshipman's aptitude and potential for commissioned service." *Steffan*, 733 F. Supp. at 116 (quoting United States Naval Academy Regulations, ¶ 12010.3.4 (rev. 1978)).

130. *Steffan*, 41 F.3d at 683.

131. *Id.* "Resigned" would appear on Steffan's transcript rather than "Discharged" if he submitted a qualified resignation. *Id.* However, the qualified resignation included an acknowledgement that the midshipman would be recommended for discharge if he did not resign. *Id.*

132. *Id.*



his return to the Academy.<sup>133</sup> The Secretary, upon recommendation of the Superintendent of the Academy, denied Steffan's request and Steffan brought suit in the United States District Court for the District of Columbia.<sup>134</sup>

Steffan alleged that the Academy had violated his "constitutional rights to free speech and association, due process, and equal protection."<sup>135</sup> After finding that Steffan had "pled sufficient facts to defeat a motion to dismiss for want of standing,"<sup>136</sup> a dispute arose during discovery over the issue of homosexual conduct.<sup>137</sup> During a deposition, Steffan refused to answer questions concerning whether he had ever engaged in "homosexual acts."<sup>138</sup> The court found that "whether [Steffan] had engaged in homosexual conduct was the 'key' question in th[e] case."<sup>139</sup> The court dismissed Steffan's suit because he refused to answer the questions<sup>140</sup> and Steffan appealed.<sup>141</sup>

The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") reversed the district court's decision, finding that the Navy's decision to seek Steffan's discharge from the Naval Academy was "based on his admissions that he is a homosexual rather than on any evidence of misconduct."<sup>142</sup> Since Steffan's conduct was not a basis for the Navy's decision, the conduct was not relevant to the suit.<sup>143</sup> The D.C. Circuit reversed the judgment of the district court and remanded the case for further proceedings.<sup>144</sup>

On remand, the district court granted the defendant's motion for sum-

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133. *Steffan*, 733 F. Supp. at 117.

134. *Steffan*, 41 F.3d at 684; *Steffan*, 733 F. Supp. at 117.

135. *Steffan*, 733 F. Supp. at 115-16.

136. *Id.* at 119. Defendants (the Secretary of Defense, the Secretary of the Navy, the Superintendent of the Naval Academy, and the Commandant of Midshipmen) argued that Steffan's voluntary resignation deprived the court of subject matter jurisdiction and that the "action should be dismissed for failure to state a claim because the complaint does not adequately allege that [Steffan]'s resignation was involuntary." *Id.* at 117.

137. *Steffan*, 733 F. Supp. at 122.

138. *Id.* at 123. Steffan did deny having engaged in homosexual acts prior to entering the Naval Academy. *Id.*

139. *Id.*

140. *Id.* at 122.

141. *Steffan*, 920 F.2d at 75.

142. *Id.* at 75 (quoting *Steffan*, 733 F. Supp. at 124).

143. *Id.* at 76.

144. *Id.* At one point during the subsequent proceedings, Steffan sought to have the court recuse itself after Judge Gasch referred to Steffan as a "homo." *Steffan v. Cheney*, No. 88-3669(OG), 1991 U.S. Dist. LEXIS 4852 at \*10 (D.D.C. Apr. 12, 1991). Judge Gasch wrote that he meant no offense by the use of the word and that its use was insufficient to lead an average person to question the court's impartiality. *Id.* at \*14.

mary judgment.<sup>145</sup> In its conclusion, the court stated:

The Department of Defense's regulations that prohibit homosexuals from serving in the Navy and the other armed services establish classifications that rationally further legitimate state purposes. Those purposes include the maintenance of discipline, morale, good order, a respected system of rank and command, a healthy military force, morality and respect for the privacy interests of both officers and the enlisted. [Steffan] is not a member of a suspect class entitled to heightened scrutiny. Under the deferential standard of rational basis review, coupled with judicial deference to the military and the legislature, the regulations in question are not violative of the equal protection component of the Due Process Clause of the [F]ifth [A]mendment.<sup>146</sup>

Once again, Steffan appealed.<sup>147</sup> The D.C. Circuit reversed the district court and ordered that Steffan be (1) awarded his diploma from the Naval Academy, (2) reinstated to military service, and (3) commissioned as an officer.<sup>148</sup> The court found that the Navy's actions forcing Steffan to resign solely because he admitted his homosexual orientation were not rationally related to any legitimate goal.<sup>149</sup> Therefore, the court decided that the military's policy was based only upon prejudice and the "constitutional requirement of equal protection forbids the government to disadvantage a class based solely upon irrational prejudice, whatever the

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145. *Steffan*, 780 F. Supp. at 2.

146. *Id.* at 16.

147. *Steffan*, 8 F.3d at 61.

148. *Id.* at 70.

149. *Id.* The court came up with an interesting hypothetical to show that the military's assertion that the discharge was based on *conduct* alone (with a statement being evidence of conduct), and not on status, was incorrect:

[I]magine that two servicemembers engage in homosexual conduct. One is homosexual by orientation—that is, he "desires" to engage in homosexual acts. The other is heterosexual—that is, although he did engage in a homosexual act on this occasion, it was a departure from his usual practice and he does not "desire" to engage in any more such acts. Both servicemembers admit their conduct to their superiors; both truthfully represent their sexual orientations. . . . [T]he homosexual servicemember will be discharged—period. . . . [T]he heterosexual servicemember stands a good chance of remaining in the military. . . .

. . . Whether the servicemember has engaged in homosexual conduct or has stated that he is a homosexual, he can escape dismissal by showing that he is a heterosexual. But he can never escape dismissal, once he truthfully admits his orientation or his conduct, if he "desires" to engage in homosexual acts. The Directives thus attack status, not conduct; and the status they are after is defined only by one's thoughts.

*Id.* at 65.

standard of review."<sup>150</sup>

After both a judge of the court, *sua sponte*, and the military requested a hearing *en banc*, the judgment of the circuit court was vacated and a rehearing was granted.<sup>151</sup> The D.C. Circuit affirmed the district court, holding Steffan's discharge from the Naval Academy constitutional.<sup>152</sup>

Finding that the Navy could discharge a servicemember based on his homosexual conduct,<sup>153</sup> the court stated that "the military may reasonably assume that when a member states that he is a homosexual, that member means that he either engages or is likely to engage in homosexual conduct."<sup>154</sup> In reaching its decision, the court criticized the Ninth Circuit's decision in *Meinhold*,<sup>155</sup> finding that the Ninth Circuit had mischaracterized the "class of persons at issue."<sup>156</sup> Steffan decided not to appeal the D.C. Circuit's decision,<sup>157</sup> thereby leaving a conflict between the D.C. Circuit and the Ninth Circuit in *Meinhold*.<sup>158</sup>

#### 4. *Able v. United States*<sup>159</sup>

*Pruitt*, *Meinhold*, *Cammermeyer*, and *Steffan* are challenges which arose under the military's policy concerning homosexuality before the implementation of the "Don't ask, Don't tell" policy.<sup>160</sup>

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150. *Id.* at 70 (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-50 (1985)).

151. *Steffan*, No. 91-5409, 1994 U.S. App. LEXIS 9977, at \*1 (D.C. Cir. Jan. 7, 1994).

152. *Steffan*, 41 F.3d at 699.

153. *Id.* at 687. Steffan conceded this much, as well. *Id.* at 685.

154. *Id.* at 686.

155. See discussion *supra* part III.B.1.

156. *Steffan*, 41 F.3d at 687 n.7.

The Ninth Circuit accepted *Meinhold*'s characterization that the class of persons at issue was those "who say they are gay but have not acted in accordance with their propensity in the past." In our view, however, the proper characterization of the class is persons who say they are gay, but as to whom the military has no additional evidence as to their conduct.

*Id.*

157. See Update, *supra* note 121, at 20. Steffan's case is reported under the section of the memorandum titled, "Cases Challenging Military Policy on Homosexuality, Final Decisions," *id.* at 17, and states "Steffan did not seek certiorari from the United States Supreme Court," *id.* at 20.

158. See Toni Locy, *Appeals Court Backs Expulsion of Homosexual Midshipman*, WASH. POST, Nov. 23, 1994, at A2 ("In a 7 to 3 decision, the U.S. Court of Appeals for the D.C. Circuit reversed a year-old ruling by a three-judge panel and broke with other federal courts across the country that have considered similar issues.").

159. 847 F. Supp. 1038 (E.D.N.Y.), *motion to vacate denied*, 863 F. Supp. 112 (E.D.N.Y.), *appeal denied*, 870 F. Supp. 468 (E.D.N.Y. 1994), *remanded*, 44 F.3d 128 (2d Cir.), and 880 F. Supp. 968 (E.D.N.Y. 1995).

160. The appellate court, in *Meinhold*, specifically noted that the regulations have since

The new policy has also been challenged in court.<sup>161</sup> On March 30, 1995, the Federal District Court for the Eastern District of New York, in *Able v. United States*, ruled that the new policy violates an individual's freedom of speech under the First Amendment and equal protection rights under the Fifth Amendment.<sup>162</sup>

The plaintiffs in *Able* are six homosexual members of the Armed Forces.<sup>163</sup> Upon initiating a legal challenge to the policy, the commanding officer notified plaintiff Robert S. Heigl that an administrative discharge "by reason of [u]nsuitability [d]ue to [h]omosexuality" was being recommended.<sup>164</sup> The court concluded that the United States was preliminarily enjoined "from investigating or discharging or taking other adverse or punitive action against plaintiffs based on their self-identification as gay or lesbian."<sup>165</sup>

The DoD then informed the plaintiffs that it planned to initiate discharge proceedings against two of the other plaintiffs, Sergeant Spencer and Seaman Zehr.<sup>166</sup> These discharge proceedings were to be based upon statements made outside of the suit where they identified themselves as homosexuals.<sup>167</sup> The plaintiffs sought a second injunction.<sup>168</sup> The district court granted a second order "enjoining defendants 'from investigating, discharging or taking other adverse or punitive action, pursuant to the Act and/or Regulations, against plaintiffs based on their self-identification as lesbian or gay.'"<sup>169</sup>

The DoD appealed both orders to the United States Court of Appeals for the Second Circuit.<sup>170</sup> The Second Circuit considered only the narrow issue of the "proper standard in deciding [whether or not] to issue the two preliminary injunctions."<sup>171</sup> The court found that "[w]here the moving

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been changed and expressed no opinion regarding the new policy. *Meinhold*, 34 F.3d at 1472 n.2.

161. See Update *supra* note 121, at 2-10. The section of the memorandum titled "Federal Cases Challenging Military's Policy on Homosexuality, New Regulations Cases" identifies six cases challenging the "Don't ask, Don't tell" policy. *Id.* at 2, 3, 5, 7, 8, and 9. Three other cases being prepared for filing, are also identified. *Id.* at 4, 6, and 10.

162. *Able*, 880 F. Supp. 968, 980 (E.D.N.Y. 1995); Update, *supra* note 121, at 2.

163. *Able*, 847 F. Supp. at 1038.

164. *Id.* at 1041.

165. *Id.* at 1045.

166. *Able*, 44 F.3d at 130.

167. *Id.*

168. *Id.*

169. *Id.* (quoting *Able*, 847 F. Supp. at 1038).

170. *Id.*

171. *Id.*

party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme," they must establish a likelihood of success on the merits in addition to irreparable harm if the injunction is not granted.<sup>172</sup> The district court applied a less rigorous standard, sufficiently "serious questions going to the merits," rather than a likelihood of success on the merits.<sup>173</sup>

The Second Circuit, rather than applying the "likelihood of success" standard on its own, remanded to the district court for determination of the higher standard.<sup>174</sup> The Second Circuit allowed the injunctions to remain in place pending resolution of the issue, "lest plaintiffs lose altogether the opportunity to litigate their facial constitutional challenges in the case's present posture."<sup>175</sup> The court required that the preliminary injunction hearing be consolidated with a trial on the merits of a permanent injunction.<sup>176</sup> The preliminary injunction orders were to remain in effect "until March 31, 1995 upon which date they [were to] expire unless reentered by the district court following a trial on the merits of plaintiffs' request for a permanent injunction."<sup>177</sup>

On March 30, 1995, the district court found that the policy and the directives implementing the regulations violated the "First and Fifth Amendments and enjoin[ed] defendants from enforcing them against plaintiffs."<sup>178</sup> In reaching its decision, the court focused on subsection (b)(2)<sup>179</sup> of the regulations and found two pertinent aspects: "It provides for the discharge of a member because he or she (1) has made a 'state-

172. *Id.* at 131 (quoting *Plaza Health Lab., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989)).

173. *Id.* at 130 (quoting *Able*, 847 F. Supp. at 1038).

174. *Id.* at 132 (citing 28 U.S.C. § 2106 (1988); 11 WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2962, at 638).

175. *Id.*

176. *Id.*

177. *Id.* at 133.

178. *Able*, 880 F. Supp. at 980.

179. Subsection (b)(2) reads:

(b) Policy—A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance set forth in such regulations:

...

(2) That member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

10 U.S.C. § 654(b)(2) (Supp. V 1993).

ment' and (2) the statement is of his or her status, that is, his or her 'propensity.'"<sup>180</sup> The court found that "a mere statement of homosexual orientation is not sufficient proof of intent to commit acts as to justify the initiation of discharge proceedings,"<sup>181</sup> and held the regulation invalid under the First Amendment.<sup>182</sup> The court also found that defendants did not make the required showing that the policy is "'tailored to serve a substantial governmental interest,'"<sup>183</sup> and therefore, the regulation violated the equal protection clause of the Fifth Amendment.<sup>184</sup> The government has appealed the decision to the Second Circuit.<sup>185</sup>

### 5. *Lieutenant Zoe Dunning*

Lieutenant Zoe Dunning is a 1985 graduate of the Naval Academy with an M.B.A. from Stanford University.<sup>186</sup> She acknowledged her sexual orientation at a rally in support of President Clinton's pledge to end the ban on homosexuals in the military. As a result, her commanding officer recommended her discharge.<sup>187</sup> Dunning's administrative board met on June 9, 1993, and recommended an honorable discharge. Dunning requested that the Secretary of Defense investigate possible improper command influence in her administrative board.<sup>188</sup> As a result, Dunning faced a second board.<sup>189</sup>

In a surprising decision, the administrative board recommended Dunning's retention in the Navy.<sup>190</sup> The board's recommendation will go to the Naval Bureau of Personnel, which will make a recommendation to the Secretary of the Navy.<sup>191</sup> The Secretary of the Navy will make the

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180. *Able*, 880 F. Supp. at 972 (quoting 10 U.S.C. § 654(b)(2) (Supp. V 1993)).

181. *Id.* at 976.

182. *Id.* at 980.

183. *Id.* (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 99 (1972)).

184. *Id.*

185. Update, *supra* note 121, at 2.

186. Interview with Michelle Benecke and Dixon Osburn, Co-chairs of the Servicemembers Legal Defense Network, Washington, D.C. (Dec. 12, 1994).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Tribunal Urges Navy Not To Discharge Lesbian*, L.A. TIMES, Dec. 2, 1994, at A25; see also *Navy Board Backs Lesbian*, WASH. POST, Dec. 2, 1994, at A14 ("In a surprising decision, a Navy tribunal decided yesterday that Lt. Zoe Dunning's career in the Reserves should not end with the statement 'I am a lesbian.'"); Reynolds Holding, *Debate on Gays in Military is Headed for Supreme Court*, S.F. CHRON., Dec. 3, 1994, at A6 ("A Navy panel's recommendation Thursday to keep Zoe Dunning in the naval reserve was an unexpected victory for gays and lesbians in the military . . .").

191. Holding, *supra* note 190, at A6.

final decision whether or not to retain or discharge Dunning.<sup>192</sup> The board found that Dunning's statement was not a proclamation of her "intentions to practice homosexuality, but merely [an] indicat[ion of] her sexual orientation."<sup>193</sup> This is the first time a military board has sided with an openly homosexual person.<sup>194</sup>

#### IV. THE BAN, BIOLOGY, AND THE COURTS

In announcing the new policy on homosexuals in the military, President Clinton said: "There is no study . . . showing [homosexuals] to be less capable or more prone to misconduct than heterosexual soldiers."<sup>195</sup> Indeed, the President could have cited to the military's own studies that show homosexuals to be as capable as heterosexual soldiers.<sup>196</sup>

The Supreme Court has devised three levels of scrutiny for equal protection challenges to state action:<sup>197</sup> (1) strict scrutiny for discrimination based on race, alienage, or national origin (*i.e.*, a "suspect class");<sup>198</sup> (2) heightened review for discrimination based on gender or illegitimacy;<sup>199</sup> and (3) rational basis review for discrimination based on other classifications.<sup>200</sup> Strict scrutiny requires the state action to be "suitably tailored to serve a compelling state interest."<sup>201</sup> Heightened review requires the action to be "substantially related to a legitimate state interest."<sup>202</sup> Rational basis simply requires that the "classification drawn by the statute is rationally related to a legitimate state interest."<sup>203</sup>

Even under rational basis, the lowest level of judicial scrutiny, the military must show that its discrimination against homosexuals is based on a rational means to meet a legitimate government interest.<sup>204</sup> The interest that the military has advanced to justify its policy, "good order, discipline and morale," is contradicted by the court decisions already in place. The

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192. *See id.*

193. *Navy Board Backs Lesbian*, *supra* note 190, at A14.

194. *Id.*

195. Burr, *supra* note 4, at 98 (quoting Clinton's announcement on CNN).

196. *See supra* notes 59-65 and accompanying text; *see also* PERSEREC, *supra* note 21, at iii ("Few data have been put forward to support the belief that being homosexual predisposes a person to unreliability, disloyalty, or untrustworthiness.").

197. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985).

198. *Id.* at 440 (citations omitted).

199. *Id.* at 440-41.

200. *Id.* at 440.

201. *Id.*

202. *Id.* at 441 (quoting *Mills v. Habluetzel*, 45 U.S. 91, 99 (1982)).

203. *Id.* at 440.

204. *Id.*

decisions of the courts in *Meinhold*, *Cammermeyer*, and *Able*, and the decision of the board in Dunning's case, indicate that *openly* homosexual persons are serving in the military. The *Cammermeyer* court found it "ironic that after over three years as an acknowledged homosexual servicemember, Cammermeyer was evaluated as having 'the potential to assume responsibility at N[ational] G[uard] B[ureau] Level as Chief Nurse,' yet she was discharged because of the alleged incompatibility of her sexual orientation with military service."<sup>205</sup>

The quality of service provided by openly homosexual persons undermines the military's position that a ban on homosexuals is necessary to maintain "good order, discipline and morale." Moreover, evidence suggesting a biological role in the determination of sexual orientation<sup>206</sup> may lead to an equal protection argument based on homosexuality as an "immutable characteristic."<sup>207</sup> If this argument is successful, the military would be confronted with a greater burden (*i.e.*, strict scrutiny) in justifying exclusion of homosexuals from the service.

## V. CONCLUSION

There is disagreement among the federal courts as to the constitutionality of the "Don't ask, Don't tell" policy. The Ninth Circuit, in *Meinhold*, found the statement, "I am in fact gay," insufficient to show a concrete desire to commit homosexual acts. The district court, in *Able*, likewise found that a statement was insufficient to show intent to commit homosexual acts. Conversely, the D.C. Circuit in *Steffan* found that a statement is sufficient to show homosexual conduct, and that the military may discharge a servicemember based upon conduct as evidenced by a statement. Furthermore, the D.C. Circuit found that such treatment did not violate the equal protection clause of the Constitution, while the Ninth Circuit found that construing the regulation to apply to the classification of being homosexual would implicate equal protection. The dis-

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205. *Cammermeyer*, 850 F. Supp. at 926.

206. See discussion *supra* part II; see also HAMER & COPELAND, *supra* note 41, at 212 ("As long as opponents of gay rights continue to argue that homosexuality is a 'choice,' gay activists likely will continue to quote scientific findings of a biological role in sexual orientation.").

207. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990). One requirement for a group to be found to be a "suspect" class triggering strict scrutiny, or a "quasi-suspect" class triggering heightened scrutiny, is to "exhibit obvious, immutable or distinguishing characteristics." *Id.* (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (citing *Lyng v. Castillo*, 477 U.S. 635, 638 (1986))).



strict court, in *Cammermeyer*, found that the policy is based solely on prejudice and cannot stand.

Because of the disparity among the lower courts, the possibility exists that the constitutionality of the "Don't ask, Don't tell" policy will be decided by the Supreme Court. How the Court will rule on the issue is not clear. The Court has held that homosexual conduct is not a fundamental right under due process.<sup>208</sup> It has, however, found that criminal laws based upon one's sexual orientation are unconstitutional.<sup>209</sup> Furthermore, the court has said that discrimination must not be based on prejudices or reactions of some faction of the population.<sup>210</sup>

The Court has yet to consider whether homosexuality may be considered a suspect class entitled to strict scrutiny under an equal protection analysis.<sup>211</sup> The evidence of a biological "cause" of homosexuality, however, may lead to an equal protection argument based on homosexuality as an "immutable characteristic." If successful, this argument would require the Court to apply strict scrutiny to the military's policy concerning homosexuals. The high quality of service of openly homosexual persons serving in the military, coupled with biological evidence as to the origins of homosexuality, may tip the balance in favor of greater protection for homosexual servicemembers.

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208. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

209. *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

210. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *see also* Brief for *Amici Curiae*, *supra* note 30, at 21 (providing that the "military's justification is that some heterosexuals in the services hold prejudices against gay men and lesbians, and that these prejudices are so strong that the mere presence of gay men and lesbians in the armed services may cause the heterosexuals to disrupt the military's smooth operation").

211. *See Cooper*, *supra* note 75, at 205.